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## US Court of Appeals for the First Circuit

Court of Appeals Docket #: 01-2039

Filed: 7/18/01

Nsuit: 0 (Criminal or NOT SET)

US v. Figliolini

Appeal from: U.S. District Court of MA

### ----- Lower court information:

District: 0101-1 : 99-10172                      lead: 99-10172  
 trial judge: George A. O'Toole, Jr.  
 trial judge: Robert B. Collings, Magistrate Judge  
 trial judge: Marianne B. Bowler, Magistrate Judge  
 court reporter: ECR  
 court reporter: Nancy Eaton, Court Reporter  
 court reporter: Jill Ruggieri, Court Reporter  
 court reporter: James E. McLaughlin, Court Reporter  
 trial judge: Charles B. Swartwood, III, Magistrate Judge  
 Date Filed: 5/20/99  
 Date order/judgment: 7/3/01  
 Date NOA filed: 7/3/01

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 Fee status: in forma pauperis

### ----- Prior cases:

None

### Current cases:

Related:	Lead	Member	Start	End
	01- 2039	01- 2405	10/5/01	
	01- 2039	01- 2548	11/5/01	
	01- 2039	01- 2614	11/15/01	
	01- 2039	01- 2615	11/15/01	

### ----- Panel Assignment:

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UNITED STATES  
 Appellee

Dina Michael Chaitowitz  
 617-748-3100 x3110  
 [COR NTC gvt]  
 U.S. Attorney's Office  
 John Joseph Moakley Courthouse  
 1 Courthouse Way  
 Boston, MA 02210

Dickens Mathieu  
617-748-3227  
[COR NTC gvt]  
U.S. Attorney's Office  
John Joseph Moakley Courthouse  
One Courthouse Way  
Boston, MA 02210

v.

JON FIGLIOLINI  
Defendant - Appellant

Jon Figliolini  
A85151  
[LD NTC pro]  
OCCC  
1 Administration Rd.  
Bridgewater, MA 02324

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UNITED STATES

Appellee

v.

JON FIGLIOLINI

Defendant - Appellant

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7/18/01 CRIMINAL CASE docketed. Opening forms sent. Notice filed by Appellant Jon Figliolini. Appearance form due 8/1/01. Docketing Statement due 8/1/01. Transcript Report/Order due 8/1/01. [01-2039] (lina)

7/18/01 RECORD filed: 1 volume. [579215-1] [01-2039] (lina)

7/30/01 APPEARANCE filed by Dickens Mathieu for Appellee US. [582041-1] [01-2039] (lina)

7/30/01 Involvement of attorney Marietta I. Geckos for US terminated. [01-2039] (lina)

7/30/01 Request filed by Appellant Jon Figliolini for appointment of counsel. Certificate of service dated 7/26/01. [01-2039] (lina)

7/31/01 ATTORNEY Lois M. Farmer for Appellant Jon Figliolini added to case. [01-2039] (lina)

7/31/01 ORDER filed. Attorney Lois Farmer appointed as counsel for appellant under the guidelines of CJA. (lina)

7/31/01 ORDER filed. Attorney R.J. Cinquegrana and Attorney Scott H. Kremer are allowed to withdraw as counsel for appellant. New counsel has been appointed this date under the guidelines of the Criminal Justice Act. Attorney Cinquegrana is directed to forward this case record by August 14, 2001, to Attorney Lois Farmer at Garnick & Scudder, P.C., 32 Main Street, P.O. Box 398, Hyannis, MA 02601. (lina)

7/31/01 Involvement of attorney Scott H. Kremer for Jon Figliolini, attorney R.J. Cinquegrana for Jon Figliolini terminated. [01-2039] (lina)

7/31/01 ORDER filed. New counsel having been appointed this date, It is ordered that the time for appellant to file the transcript report/order form, the docketing statement and the appearance form be enlarged to and including August 21, 2001. [01-2039] (lina)

8/6/01 ATTORNEY Dina Michael Chaitowitz for Appellee US added to case. [01-2039] (lina)

8/6/01 APPEARANCE filed by Dina Michael Chaitowitz for Appellee US. [583809-1] [01-2039] (lina)

8/8/01 Involvement of attorney Gavin A. Corn for US terminated. [01-2039] (lina)

8/13/01 APPEARANCE filed by Lois M. Farmer for Appellant Jon Figliolini. [585401-1] [01-2039] (lina)

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8/13/01 DOCKETING STATEMENT filed by Appellant Jon Figliolini. [01-2039] (lina)

8/28/01 TRANSCRIPT REPORT/ORDER for Appellant Jon Figliolini Defaulted. Your case will be dismissed if you do not file your Transcript report/order by 9/7/01 . (lina)

9/7/01 (2) TRANSCRIPT REPORT/ORDERS filed by Appellant Jon Figliolini. Transcript (8/3/00 Change of Plea Hearing, Nancy Eaton and 6/27/01 Sentencing Hearing, Jill Ruggieri) are ordered by filing of these forms. Transcript 11/7/01. [01-2039] (lina)

10/5/01 ORDER filed. It is ordered that the above-captioned appeals be consolidated for the purposes of scheduling and oral argument. [01-2039, 01-2405] (lina)

11/1/01 MOTION filed by Appellant Jon Figliolini in 01-2039 to extend time to file transcript until 11/29/01. Certificate

service dated 10/30/01. [01-2039] (lina)

11/1/01 ORDER filed. Upon consideration of motion, It is ordered that the time for Court Reporter Nancy Eaton to file the transcript be enlarged to and including November 29, 2001. [01-2039] (lina)

11/6/01 ORDER filed. It is ordered that the above-captioned appeals be consolidated for the purposes of scheduling and oral argument. [01-2039, 01-2405 and 01-2548] (lina)

11/14/01 TRANSCRIPT REPORT/ORDER filed by Appellant Jon Figliolini. Transcript(s) (Change of Plea Hearing, 8/3/00) filed in District Court by court reporter Nancy Eaton in 01-2039. [01-2039] (lina)

11/14/01 Transcript(s) (Change of Plea Hearing, 8/3/00) filed by court reporter Nancy Eaton in 01-2039. [01-2039] (lina)

11/16/01 SUPPLEMENTAL RECORD consisting of 1 volume of transcript (No. 863 Change of Plea for Jon Figliolini, Nancy Eaton) filed. [610435-1] [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (lina)

11/16/01 Court Reporter memo sent. Transcript due 11/26/01 for Jill Ruggieri. [01-2039] (lina)

11/16/01 ORDER filed. Appeal Nos. 01-2039, 01-2405, 01-2548, 01-2614 and 01-2615 are consolidated for purposes of scheduling and argument. The clerk will set a briefing schedule once the record on appeal, including all necessary transcripts, is complete. Appellants' may file separate briefs. Appellee's brief shall be due within 30 days after service of the last appellant's brief. (lina)

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11/21/01 APPEARANCE filed by Dickens Mathieu for Appellee US in 01-2614, Dickens Mathieu for Appellee US in 01-2039. [612279-1] [01-2614, 01-2039] (trim)

11/21/01 APPEARANCE filed by Dickens Mathieu for Appellee US in 01-2614, Dickens Mathieu for Appellee US in 01-2039. [612313-1] [01-2614, 01-2039] (trim)

12/5/01 MOTION filed by Appellant Jon Figliolini in 01-2039 to extend time to file transcript until 12/21/01. Certificate service dated 12/3/01. [01-2039] (frnk)

12/5/01 ORDER filed. Upon consideration of motion, It is hereby ordered that the time for the appellant to file the transcript (Motion Hearing dated 11/29/01) be enlarged to and including 12/21/01. Transcript due 12/21/01. [01-2039] (frnk)

12/19/01 SUPPLEMENTAL RECORD consisting of pleading 879 for Rafaella Rosario (No. 01-2548) (Defendant Rafaella Rosario's Motion for leave to proceed in forma pauperis, Allowed 12/12/01)

filed. [619350-1] [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (lina)

- 1/4/02 Court Reporter memo sent. Transcript due 1/14/02 for Jill Ruggieri for Motion Hearing dated 11/29/99. [01-2039] (lina)
- 1/28/02 SHOW CAUSE ORDER filed. On January 4, 2002, Court Reporter Jill Ruggieri was notified that the transcripts (Sentencing Hearing, June 27, 2001 and Motion Hearing, November 29, 1999) have not been filed in this case, and was asked to take action by January 14, 2002. It does not appear that the court reporter has filed the transcripts in the district court, or in the alternative, a motion in the court of appeals for an extension of time to complete the See Fed. R. App. P. 11(b)(1). Accordingly, the court directs Jill Ruggieri to produce the transcripts by February 28, 2002, or to show cause by February 11, 2002, why she cannot produce the transcript by February 28, 2002. The failure to take either action may lead to this court holding Jill Ruggieri in contempt. (lina)
- 2/5/02 SUPPLEMENTAL RECORD consisting of 1 volume of transcript for Antonio Ortiz (01-2405). Rule 11 Hearing February 22, 2001, Deborah L. Nemetz, Court Reporter. filed. [631321-1] [01-2405, 01-2039, 01-2548, 01-2614, 01-2615] (lina)
- 2/19/02 SUPPLEMENTAL RECORD consisting of transcript no. 897 for Jon Figliolini, 01-2039, (Sentencing hearing 6/27/01, Jill Ruggieri) filed. [634845-1] [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (lina)

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- 2/19/02 No response was filed just the sentencing transcript filed by Jill Ruggieri. (lina)
- 2/19/02 SUPPLEMENTAL RECORD consisting of 1 volume of transcript (No. 899 for Antonio Ortiz, 01-2405, Sentencing hearing 9/14/01, Jill Ruggieri) filed. [634861-1] [01-2039, 01-2405, 01-2614, 01-2615] (lina)
- 2/19/02 SUPPLEMENTAL RECORD consisting of 1 volume of transcript (No. 898 for John Damien, 01-2615, Sentencing hearing, 11/5/01, Jill Ruggieri) filed. [634871-1] [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (lina)
- 2/27/02 BRIEFING SCHEDULE. Appellant's Brief due 4/8/02. Appellee's Brief due 5/8/02. Reply brief due 5/22/02. [01-2039] (lina)
- 3/1/02 SUPPLEMENTAL RECORD consisting of 1 volume of transcript for Robert Cyr, 01-2614, Transcript of Sentencing, October 17, 2001, Harold Hagopian) filed. [638095-1] [01-2614, 01-2039, 01-2405, 01-2548, 01-2615] (lina)
- 4/4/02 BRIEF filed by Appellant Jon Figliolini in 01-2039. Length: 30 pages, Copies: 9, delivered by mail. of service date 4/2/02. [646994-1] [01-2039] (lina)

4/4/02 ELECTRONIC DOCUMENT filed by Appellant Jon Figliolini in 01-2039. [01-2039] (lina)

5/10/02 SUPPLEMENTAL RECORD consisting of 1 volume of transcript filed. [655152-1] [01-2614, 01-2039, 01-2405, 01-2548, 01-2615] (lina)

5/10/02 Transcript(s) filed by court reporter Carol Fierimonte, Rule 11 Hearing, 2/23/01 for John Damien, et al., No. 908. [01-2614, 01-2039, 01-2405, 01-2548, 01-2615] (lina)

5/14/02 SUPPLEMENTAL RECORD consisting of 2 volumes of transcripts for Rafaela Rosario filed. [656101-1] [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (lina)

5/14/02 Transcript(s) filed for appellant Rafaela Rosario in 01-2548 by court reporter Jill Ruggieri (No. 909, Change of Plea Hearing, 11/23/99 and No. 910 Disposition, 10/10/01) by court reporter Carol Lynn Scott. [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (lina)

5/14/02 SUPPLEMENTAL RECORD consisting of 1 volume of transcript No. 911 for Antonio Ortiz filed. [656113-1] [01-2405, 01-2039, 01-2548, 01-2614, 01-2615] (lina)

5/14/02 Transcript(s) filed by court reporter Deborah L. Nemetz (No. 911 Sentencing Hearing, 9/10/01 for Antonio Ortiz in 01-2405. [01-2405, 01-2039, 01-2548, 01-2614, 01-2615] (lina)

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6/13/02 BRIEFING SCHEDULE. APPELLEE'S BRIEF DUE 30 DAYS AFTER LAST APPELLANTS' BRIEF. LAST APPELLANTS BRIEF DUE 7/31/02 IN 01-2615. Appellee's Brief due 9/3/02 in 01-2039, in 01-2405, in 01-2548, in 01-2614, in 01-2615. Reply brief due 9/17/02 in 01-2039, in 01-2405, in 01-2548, in 01-2614, in 01-2615. [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (lina)

7/30/02 BRIEFING SCHEDULE. Appellee's Brief due 10/21/02 in 01-2039, in 01-2405, in 01-2548, in 01-2614. Reply brief due 11/4/02 in 01-2039, in 01-2405, in 01-2548, in 01-2614. Brief for appellant in 01-2615 enlarged to 9/20/02. Appellee's brief due 30 days after last appellants' brief. [01-2039, 01-2405, 01-2548, 01-2614] (lina)

9/20/02 Last appellant's brief filed 9/20/02. BRIEFING SCHEDULE. Appellee's Brief due 10/21/02 in 01-2039, in 01-2405, in 01-2548, in 01-2614, in 01-2615. Reply due 11/4/02 in 01-2039, in 01-2405, in 01-2548, in 01-2614, in 01-2615. [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (lina)

10/16/02 MOTION filed by Appellee US in 01-2039, Appellee US in 01-2405, Appellee US in 01-2548, Appellee US in 01-2614, Appellee US in 01-2615 to extend time to file Appellee's brief until 11/4/02. Ext. Code: cnf. Certificate of service dated 10/16/02. [01-2039, 01-2405, 01-2548,

01-2614, 01-2615] (lina)

10/16/02 ORDER filed. Upon consideration of motion, It is hereby ordered that the time for the appellee to file its brief be enlarged to and including November 4, 2002. [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (lina)

11/1/02 GOVERNMENT'S MOTION FOR TWO-DAT CONTINUANCE TO 11/7/02, WITHIN WHICH TO FILE BRIEFS filed by Appellee US in 01-2039, 01-2405, 01-2548, 01-2614, 01-2615 to extend time to file Appellee's brief until 11/7/02. Ext. Code: CNF. Certificate of service dated 11/1/02. [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (mlyn)

11/1/02 ORDER. Upon consideration of motion, It is hereby ordered that the time for the appellee to file its brief be enlarged to and including November 7, 2002. No further extensions of this deadline should be expected. Appellee Brief Due 11/7/02 in 01-2039, in 01-2405, 01-2548, 01-2614, 01-2615. [01-2039, 01-2405, 01-2548, 01-2614, 01-2615] (mlyn)

11/6/02 MOTION filed by Appellee US in 01-2039 for summary disposition Local Rule 27(c). Certificate of service dated 11/6/02. [01-2039] (lina)

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11/6/02 MOTION filed by Appellee US in 01-2039 to extend time to file Appellee's brief for 45 days pending the motion for summary disposition. Ext. Code: otr. Certificate of service dated 11/6/02. [01-2039] (lina)

11/6/02 MOTION filed by Appellee US in 01-2039 to file supplemental appendix under seal. Certificate of service dated 11/6/02. [01-2039] (lina)

11/7/02 ORDER filed. Upon consideration of motion, It is hereby ordered that the time for the appellee to file its brief be enlarged to and including December 23, 2002. (lina)

11/7/02 ELECTRONIC DOCUMENT filed by Appellee US in 01-2039 to the motion for summary disposition. [01-2039] (lina)

11/7/02 ORDER filed. Upon consideration of motion, Leave is granted appellee to file its supplemental appendix under seal, instant. [01-2039] (lina)

11/7/02 SEALED SUPPLEMENTAL APPENDIX filed by Appellee US in 01-2039. Copies: 6. Volumes: 1. Delivered by hand, filed. Certificate of service date 11/6/02. [701178-1] [01-2039] (lina)

12/23/02 MOTION filed by Appellee US in 01-2039 to extend time to file Appellee's brief until 2/3/03. Ext. Code: otr. Certificate of service dated 12/23/02. [01-2039] (lina)

12/24/02 ORDER filed. Upon consideration of motion, It is hereby ordered that the time for the appellee to file its brief be



enlarged to and including February 10, 2003. [01-2039] (lina)

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1/10/03

JUDGMENT filed. Judges Torruella, Stahl and Lipez. After careful review of the record, we summarily affirm the district court. Appellant-defendant Jon Robert Figliolini appeals his sentence after pleading guilty to one count of possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). He makes two claims on appeal. First, he asserts that the government fraudulently entered into a plea agreement, stating that it would recommend a downward departure for acceptance of responsibility if Figliolini committed no post-plea crime while knowing that it would not recommend such a departure. Second, he claims that his counsel rendered ineffective assistance when he failed to object to the government's alleged fraud or to the government's delivering to him days before sentencing its sentencing memorandum stating its opposition to the downward departure for acceptance of responsibility. The record does not support a claim that the prosecutor fraudulently entered into the plea agreement. There is no evidence that, when the prosecution entered into the plea agreement, it knew of an on-going investigation within the prison or that an informant had alleged that Figliolini had asked him to procure drugs. The record reveals only that Figliolini committed a narcotics violation after the plea agreement was signed, and, on this basis, the government did not recommend a downward departure for acceptance of responsibility. Therefore, there is no factual support for Figliolini's allegation that the prosecution behaved fraudulently in signing a plea agreement in which it stated that it would recommend a downward departure if he refrained from post-plea criminal conduct. Figliolini next asserts that he received ineffective assistance of counsel. This court does not ordinarily hear claims of ineffective assistance of counsel on direct appeal. See *United States v. Ortiz*, 146 F.3d 25, 27 (1st Cir. 1998). However, where the critical facts are not genuinely in dispute and the record is sufficiently developed to allow for a reasoned consideration, an appellate court can determine the merits of the claim on direct appeal. See *id.* at 27. To establish ineffective assistance of counsel, one must make a two-part showing: (1) that his counsel's performance fell below an objective standard of reasonableness, and that (2) he was thereby prejudiced. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In deciding an ineffectiveness claim, the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." See *id.* at 690. In this instance, Figliolini and the government both appear to argue that the record is sufficient to decide a claim of ineffective assistance of counsel. We decide here only that, to the extent that Figliolini argues ineffective assistance of counsel based on the present record, he cannot prevail. The record does not support the contention of fraud advanced by Figliolini, and it is thus not



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possible to find that his counsel was unreasonable in failing to object to such alleged fraud on the part of the prosecution. Furthermore, Figliolini points to no statute or case law, and we find none, that requires a sentencing memorandum to be delivered to a defendant in any given time period. Therefore, based on this record, his counsel was not ineffective in failing to raise these two objections. For all of these reasons, we summarily affirm. Affirmed. [716321-1] [01-2039] (lina)

1/30/03 ATTORNEY MOTION filed by Lois M. Farmer to withdraw as counsel for appellant Jon Figliolini. [721691-1] Certificate of service dated 1/27/03. [01-2039] (lina)

1/30/03 ORDER filed. Counsel for defendant-appellant, who was appointed pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, has submitted a motion for leave to withdraw. Counsel states that, upon review of this court's decision on appeal, she has concluded that filing a petition for a writ of certiorari in this case would be frivolous. Counsel certifies that she has advised defendant-appellant of his conclusion that a petition would be frivolous and that she has further advised defendant-appellant of the time in which he must apply for a writ if defendant-appellant elects to take such action. The motion further certifies that defendant has indicated that he does not wish to pursue further review. Accordingly, we grant counsel's motion to withdraw. Local Rule 46.5(c). [01-2039] (lina)

1/30/03 Involvement of attorney Lois M. Farmer for Jon Figliolini in 01-2039 terminated. [01-2039] (lina)

1/31/03 MANDATE ISSUED. [01-2039] (lina)

1/31/03 RECORD retained for companion case number(s): 01-2614. [01-2039] (lina)

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Transaction Receipt			
11/01/2004 12:00:07			
PACER Login:	us6856	Client Code:	
Description:	dkt report	Case Number:	01-2039
Billable Pages:	11	Cost:	0.77